
OPINION OF THE PUBLIC ACCESS COUNSELOR

CHRISTOPHER NARDI
Complainant,

v.

INDIANA ELECTION DIVISION
Respondent.

Formal Complaint No.
21-FC-8

Luke H. Britt
Public Access Counselor

BRITT, opinion of the counselor:

This advisory opinion is in response to a formal complaint alleging the Indiana Election Division violated the Access to Public Records Act.¹ Co-Directors for the IED, J. Bradley King and Angela M. Nussmeyer, filed an answer on behalf of the IED. In accordance with Indiana Code § 5-14-5-10, I issue the following opinion to the formal complaint received

¹ Ind. Code § 5-14-3-1-10.

by the Office of the Public Access Counselor on January 21, 2021.

BACKGROUND

This case involves a dispute over access to records related to several resources primarily for local election administrators to manage the Statewide Voter Registration System (SVRS).

On December 16, 2020, Chris Nardi (Complainant) filed a public records request with the IED, requesting the following:

- a) The latest Standard Operating Procedures for the SVRS
- b) Build Notes for the SVRS from January 1, 2015 to present
- c) A full copy of the latest contract for the SVRS
- d) Any analysis that informed Secretary of State Lawson's comments on August 26 that the state expected 1.3 million to 1.8 million mailed ballots in the 2020 general election

Two days later, the IED responded to Nardi, denying access to parts (a) and (b) of the request. The agency justified the denial by relying on Indiana Code section 5-14-3-4(b)(10), which gives an agency discretion to withhold administrative or technical information that would jeopardize a record keeping system, voting system, voter registration system, or security systems. The IED asserted that releasing guides, build notes, and the contract for the SVRS may compromise the safety and security of the system.

As a result, Nardi filed a formal complaint with this office.

Nardi argues that in order for the IED to apply the exception the agency must establish that any administrative or technical information contained within the records would actually jeopardize the voter registration system, rather than just speculating that the use of the information could be potentially damaging. Nardi cites an Illinois court case that considered a similar exception, and rejected the City of Chicago's speculative argument that disclosure of a database schema would jeopardize a system it maintains.

Furthermore, Nardi argues it is unlikely the IED could prove that the release of the requested information would have a high probability of jeopardizing the SVRS. He argues that even if that were the case, the IED would then be required to separate the disclosable and nondisclosable information and provide redacted copies of the documents.

Finally, regarding the denial of item (c) of his request, Nardi contends that the contracts do not meet the standard under Indiana Code section 5-14-3-4(b)(10) because they are not administrative or technical information. He also contends that previous disclosure of records constitutes waiver of the exemption.

On February 12, 2021, the IED filed a response disputing Nardi's allegations that his records request was wrongfully denied. The IED maintains that it properly applied the disclosure exception under Indiana Code section 5-14-3-4(b)(10). Specifically, the IED argues that the requested records explain how to access and use SVRS, discloses the users who can statutorily access the system, and what changes have been made to it. Moreover, the IED states that the

agency has the discretion to not provide the records in light of the recent attack to voter registration and election systems in the United States. The IED concludes its response by restating a commitment to maintaining safety and security of the State's elections and asks that this office dismiss all allegations of wrongdoing.

ANALYSIS

1. The Access to Public Records Act

The Access to Public Records Act (APRA) states that “(p)roviding persons with information is an essential function of a representative government and an integral part of the routine duties of public officials and employees, whose duty it is to provide the information.” Ind. Code § 5-14-3-1. The Indiana Election Division is a public agency for purposes of APRA; and therefore, subject to the law's requirements. *See* Ind. Code § 5-14-3-2(q). As a result, unless an exception applies, any person has the right to inspect and copy the IED's public records during regular business hours. Ind. Code § 5-14-3-3(a).

Indeed, APRA contains exemptions and discretionary exceptions to the general rule of disclosure. *See* Ind. Code § 5-14-3-4(a)—(b).

2. Administrative and technical information exception

Under APRA, public agencies have discretion to release or withhold records that are:

Administrative or technical information that would jeopardize a record keeping system, voting system, voter registration system, or security system.

Ind. Code § 5-14-3-4(b)(10). While the terms in this exception are not statutorily defined, our courts and this office have taken passes at what this exception entails.

Most recently, this office considered whether the exception applied to the personal email addresses of public officials. Unequivocally, we said it did not and a trial court confirmed:²

...it is unlikely the General Assembly intended to include private email addresses as critical information of a record keeping or security system as private email addresses are not part of a public agency's IT infrastructure.

Opinion of the Public Access Counselor, 19-FC-2 (2019). Additionally, the panel in *City of Elkhart v. Open Government, Inc.*, 683 N.E.2d 622 (Ind. Ct. App. 1997) concluded that the exception did not apply to public agency telephone numbers.

These cases illustrate that the exception is not absolute, and there are boundaries to what may be withheld. What may be considered to be administrative and technical information may not always jeopardize a record keeping system or voter registration system.

Notably, Nardi points to an administrative holding from the chancery division of the Cook County, Illinois Circuit Court regarding a similar exception. While a case like this is not binding on this office or any other court, it can be persua-

² *Indiana Newspapers, LLC d/b/a The Indianapolis Star, Ryan Martin v. Office of the Attorney General, Curtis T. Hill, Jr.*, 49D13-1907-MI-026838 (Marion Superior Court, 2021).

sive. In this case, however, the statutes themselves are distinguishable. Illinois statute 5 ILCS 140/7(1)(o) does not mention voter registration systems in the language of its law.³

While a finder of fact could possibly dive deeper into the technical details of the Indiana statewide voter registration system, its standard operating procedures and build notes, the IED has satisfied its burden to this office that Indiana Code section 5-14-3-4(b)(10) can be reasonably construed to apply. This is precisely the type of record it appears the legislature meant to include when it imparted the discretion to release or withhold.

It is administrative and technical information and it is not a stretch to imagine an eventuality where bad actors can use the information to compromise a voter integrity. Seemingly, this is the type of record which can be withheld in its entirety, regardless of the mundanity the complainant ascribes to the information.

As for the SVRS contract, it may be true that certain deliverables or terms could be construed to fall under the (b)(10) exception, this is the type of document that can be partitioned to redact the sensitive portions and disclose the rest. The IED provided a link to the contract, but Nardi alleges

³ Administrative or technical information associated with automated data processing operations, including but not limited to software, operating protocols, computer program abstracts, file layouts, source listings, object modules, load modules, user guides, documentation pertaining to all logical and physical design of computerized systems, employee manuals, and any other information that, if disclosed, would jeopardize the security of the system or its data or the security of materials exempt under this Section. 5 ILCS 140/(7)(o)

the link is inaccessible and the contract is not there. I implore IED to revisit this issue and provide the substantive portions of the contract itself.

CONCLUSION AND RECOMMENDATIONS

Based on the foregoing, it is the opinion of this office that the Indiana Election Division did not violate the Access to Public Records Act. As for the SVRS contract, the IED should follow up and ensure Nardi has access to this document or the disclosable portions thereof.



Luke H. Britt
Public Access Counselor